Supreme Court, U.S.
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87-1652
No. .....

In The
Supreme Court of the United States
October Term, 1987

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GEORGE E. ADAM,

Petitioner,

vs.

KERR-McGEE CHEMICAL CORPORATION,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. In an age discrimination case containing mixed motives, was the trial court in error when it failed to instruct the jury that the employer was required to meet a standard of proof to overcome direct evidence of age discrimination.

STATEMENT PURSUANT TO RULE 28.1 AND PARTIES TO THE PROCEEDINGS

Petitioner, George E. Adam, is an individual citizen of the Northern District of Mississippi.

For the parties below George E. Adam was an appellant and respondent Kerr-McGee Chemical Corporation was the appellee in the Court of Appeals.

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KERR-McGEE CHEMICAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, George E. Adam (Adam), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 9, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not reported, appears in the Appendix A. The charge to the jury which contains the instruction which is the question presented and which was given by the trial court appears as Appendix B.

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JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit Court was entered on February 9, 1988, in George E. Adam v. Kerr-McGee Chemical Corporation, No. 87-4089 (5th Cir. February 9, 1988). This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1977).

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STATUTORY PROVISIONS

The Age Discrimination in Employment Act of 1967, as amended, 81 Stat. 602, 98 Stat. 1792, 29 U.S.C. §§ 621, *et seq.* (1977 and Supp. 1987).

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STATEMENT OF THE CASE

Petitioner George E. Adam claimed that he was discharged from his employment by respondent Kerr-McGee Chemical Corporation because of his age. Kerr-McGee

denied that, claiming that Adam's termination was the result of the elimination of his position. After the trial court heard evidence from the petitioner and the respondent on the claims under the Age Discrimination in Employment Act, the court charged the jury that the petitioner was required to establish his claim that age was a determining factor by a preponderance of the evidence. The court, however, failed to charge the jury with the burden of proof which the respondent had to meet in order to establish its defense that the job elimination, not age, was the motive for petitioner's discharge.

The jury returned a verdict for the respondent and the judgment entered by the trial court was affirmed by the United States Court of Appeals for the Fifth Circuit. The Court of Appeals reached the conclusion that in a full trial on the merits of an ADEA case, the burden of proof remained exclusively with the plaintiff and did not shift to the defendant to require it to establish any quantum of proof to support its claim that a factor other than age was the reason for the discharge of the employee [1] The Court of Appeals therefore announced a fundamental legal principle—instruction on burden of proof—different from other circuit courts of appeal.

Petitioner had been an exemplary employee with respondent for 34 years at the time of his termination. He

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[1]The Court of Appeals in rejecting petitioner's claim of plain error in this jury instruction held that Adam had failed to raise an adequate objection to the jury instruction. The lower court found that while an objection had been registered, it was not sufficiently specific. The court, nevertheless, proceeded to address the issue of the shifting burden of proof in this mixed or dual motive case and stated the position held by it on this issue. App. 3, p. 23a.

had risen to the position of Facilities Manager at Hamilton, Mississippi. Under his management the production at Hamilton had resulted in profits greater than the rest of the chemical corporation combined. During his employment, petitioner had received evaluations and performance ratings of "commendable". Shortly before his termination, he had received a bonus in the amount of $11,000.00 and a 10.4% merit salary increase. He had informed the company in writing that he had no intention of retiring but would give timely notice when he did decide to retire. Adam was nonetheless terminated. The action was recommended within two weeks of Mr. Adam's 60th birthday.

Petitioner was told of his termination by a vice president of the company. That officer had participated in the procedures within the company leading to the implementation of its reduction in force, which included the elimination of positions and employees. The vice president testified that the age of the person occupying a position was a factor considered in the determination to eliminate a position. This was documented by his notes from the meeting at which the reduction in force was described. The officer further testified that it was more comfortable for the company to terminate an employee of the age of petitioner because he would be eligible for pension benefits. Prior to his termination of petitioner, the vice president was sufficiently concerned about the potential for violation of the law that he consulted the Equal Employment Opportunity counsel for the company to raise his concern.

The respondent, on the other hand, claimed that age was not *the* reason for petitioner's discharge, but that the

decision was neutral on its face to eliminate the position held by the petitioner. Thus, the motive for petitioner's termination was purely related to a business decision and not to petitioner's age.

The respondent requested a jury instruction which was given to the jury as part of the charge.

> The Court instructs the jury that even if you find that age was merely one of several factors that led to the elimination of the Facilities Manager position, that does not mean that the defendant's decision was unlawful. *If the evidence shows that the Facilities Manager position would have been eliminated regardless of plaintiff's age, then you must find for the defendant.* In other words, the plaintiff must prove that age was a motivating or determinative factor in the elimination of the Facilities Manager position. [Emphasis added]

Here the jury had before it evidence of two motives for petitioner's discharge: one unlawful and one lawful. With respect to the unlawful motive, the jury was given specific direction that it must be established by a preponderance of the evidence. For the lawful motive claimed by the respondent, the jury was given no guidance as to what standard of proof it was to measure the evidence which had been presented to it.[2]

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[2]It was not contended by respondent, nor did the Court of Appeals find, that the trial court's charge contained any instruction to the jury with regard to the burden of proof upon respondent.

REASONS FOR GRANTING THE WRIT

There is direct and substantial conflict among the Circuits on the matter of federal law presented by the question in this case. The instruction on the burden of proof is of fundamental importance in the administration of the ADEA where the unlawful motive of age is mixed with some other, not unlawful, motive. This issue will be presented to the trial courts in many cases. The decision of the Court of Appeals in this case was in error.

1. The Decision Below Creates a Conflict Among the Circuits on the Question Presented.

The petitioner presented the argument to the Court of Appeals that the trial court should have applied the legal standard stated in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). That standard provides that once the plaintiff proves the presence of a discriminatory motive for the discharge, the defendant can rebut it only by proving by a preponderance of the evidence that the same decision would have been reached even absent that unlawful factor. *Id.* at 287. In rejecting the *Mt. Healthy* standard, the Court of Appeals for the Fifth Circuit acknowledged that it was contrary to the law of that Circuit. App. 3, p. 25a.

The decision of the Court of Appeals for the Fifth Circuit is in direct conflict with the decisions of four other circuits: *Fields v. Clark University*, 817 F.2d 931, 936-37 (1st Cir. 1987); *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 711 (6th Cir. 1985); *Spanier v. Morrison's Management Svcs.*, 822 F.2d 975, 979-981 (11th Cir. 1987); *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469-471 (D.C. Cir. 1987).

Three other circuits have adopted the *Mt. Healthy* analysis at the remedial stage of trial: *Smallwood v. United Airlines, Inc.*, 728 F.2d 614, 617-19 (4th Cir. 1984); *Caviale v. State of Wisconsin*, 744 F.2d 1289, 1296 (7th Cir. 1984); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1333 n.7 (9th Cir. 1981).

The United States Court of Appeals for the Eighth Circuit has adopted the *Mt. Healthy* standard for the remedy stage of trial while appearing to reject it for the liability phase of trial. *Bibbs v. Block*, 778 F.2d 1318, 1327-32 (8th Cir. 1985).[3]

2. The Question Presented is One of Substantial Importance.

The trier of fact must have a standard by which it measures the proof on an issue. That is so fundamental that with regard to instruction of the jury, the trial court is required to charge the jury even in the absence of a request for instruction by one of the parties. See, for example, *Turner Construction Company v. Houlihan*, 240 F.2d 435, 439 (1st Cir. 1957). The burden of proof falls within one of those fundamental categories.

The mixed motive employment discrimination case presents quite dramatically the necessity for direction to be given to the fact finder. The aggrieved employee must ultimately establish that he or she is the victim of unlawful discrimination. That must be proved by a preponder-

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[3]These cases principally deal with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* This Court has treated interpretations of Title VII "with equal force in the context of age discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

ance of the evidence. The employer can rebut the employee's proof by discrediting it and convincing the fact finder that the employee failed to meet its burden of proof.

But the employer may have available to it the defense that its motives for the adverse action taken against the employee were legitimate and not discriminatory. When the employer offers proof to support that contention, and the judge or jury hears it, there must be some standard by which the proof can be measured. This Court has recognized the importance of this issue in several different contexts.[4]

The increasing age of the country's work force and the shrinking job market will probably lead to an ever-increasing number of reductions in force. The statistics favor the increase in the employment terminations of those within the protected age group.[5] The number of filings of charges of age discrimination with the Equal Employment Opportunity Commission suggests that there is a correlative increase in the amount of litigation that will arise. In 1983, more than 15,000 charges of violation of the ADEA were filed with the EEOC. That was an increase of some 66% over the number filed in the

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[4]First Amendment, *Mt. Healthy, supra; Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 416-17 (1979); Equal Protection, *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 270 n.21 (1977); unfair labor practice, *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 403 (1983). It is no less important that claims under the ADEA be given the same guidance.

[5]Employees at least 40 years of age, 29 U.S.C.A. § 631 (Supp. 1987).

previous year.[6] The probable continuing increase of litigation under the ADEA will press the district courts to resolve these mixed motive cases. A uniform, definitive rule is desirable.

3. The Decision of the Lower Court in This Case Was In Error.

A fair reading of the mixed motive instruction requested by the respondent as given by the trial court reveals no instruction to the burden of proof upon the respondent to establish that it would have reached the same decision to discharge petitioner "even in the absence" of the factor of his age. This is contrary to the decision of this Court in *Mt. Healthy, supra*, 429 U.S. at 287. The error in this omission is apparent. When the charge to the jury stated "If the evidence shows that the Facilities Manager position would have been eliminated regardless of plaintiff's age, then you must find for the defendant.", the jury was unable to know what quantum of evidence would be required of the company to demonstrate that Adam would have been terminated, even without the presence of the factor of age. That the company would have been permitted, as it did, to show *some* evidence, the petitioner was left completely unprotected.

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[6]*Daily Labor Report* (BNA) No. 53 at C-1 (March 9, 1985). Though not a precise measurement of the increase in cases brought under the ADEA, the number of complaints filed in the United States district courts which charged employment discrimination increased some 14% in 1986 over 1985. *Annual Report of the Director of the Administrative Office of the U.S. Courts*, Table C-2, U.S. District Court Civil Cases Commenced by Basis of Jurisdiction and Nature of Suit During the Twelve Month Periods Ended June 30, 1985 and 1986. (1986).

A jury instructed to hold the plaintiff to the burden of a preponderance of the evidence to establish his claim that age was a determinative factor in the decision to discharge him while allowing the employer to defeat the claim of the employee with any, unspecified quantum of proof, leaves the employee at a severe disadvantage. As in this case, the employer will be able to circumvent the restraints of statutorially proscribed acts under the ADEA. This is a result contrary to the public policy of the United States as embodied by congressional act when it adopted the ADEA.

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CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Court will grant the petition for certiorari, direct the lower court to transmit the record to this Court and permit full consideration of the merits of the arguments on the question presented.

Respectfully submitted,

GEORGE E. ADAM, APPELLANT

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APPENDIX 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GEORGE E. ADAM,

Plaintiff,

v. Civil No. EC84-49-D

KERR-McGEE CHEMICAL CORPORATION,

Defendant.

(Filed January 5, 1987)

JURY CHARGE

HONORABLE GLEN H. DAVIDSON PRESIDING

November 26, 1986
United States Courthouse
Aberdeen, Mississippi

APPEARANCES:

For the Plaintiff:
John L. Maxey, II
Jackson, Mississippi

For the Defendant:
Kenneth E. Milam
W. Thomas Siler, Jr.
Jackson, Mississippi
&
Carolyn Hill
Oklahoma City, Oklahoma

RICHARD M. BUMPUS
Official Court Reporter
U. S. District Court

Northern District of Mississippi
16 Oak Parke, Belden, MS 38826
(601) 840-2011

* * *

(p. 2) THE COURT: Ladies and gentlemen of the jury, now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law that applies to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion that you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty as judges of the facts to base a verdict upon anything other than the evidence in the case.

In deciding the facts of the case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the (p. 3) consequences.

This cause should be considered and decided by you as an action between the parties of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence that I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections, or arguments made by the attorneys are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, (p. 4) and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

During the course of the trial you heard counsel announce that they would read or publish testimony of a witness that had been taken in the form of a deposition. Ordinarily, under the rules of procedure governing the

preparation of a case for trial, the parties are permitted to take and record the testimony of witnesses under oath in the same manner as you may have seen witnesses sworn and questioned here before you; and, under certain conditions, that testimony, which is called a deposition, may then be offered as evidence before the jury at the trial.

You should consider such deposition testimony, and evaluate the weight or credibility to which it is entitled, in the same way that you consider and evaluate all of the other testimony in the case. In other words, you should listen to the deposition just as though the witness was here in person to testify before you.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say in the case is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in (p. 5) the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and the evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or believability of each witness and the weight to be given to his or her testimony. In weighing the testimony of a wit-

ness you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness, and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by (p. 6) contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witness's present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give testimony of that witness such credibility or weight, if any, as you think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider such expert opinion received in evidence in this case and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

The burden is upon the plaintiff in a civil action such as this to prove every essential element of his claim by a preponderance of the evidence. A preponderance of the (p. 7) evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received into evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence, the jury should find for the defendant as to that claim.

Now, the Age Discrimination in Employment Act prohibits arbitrary age restrictions on job opportunities. It requires employers to treat employees between the ages of 40 and 70 the same as employees under the age of 40.

The Act makes it unlawful for an employer to discharge an employee between the age of 40 and 70 years of age because of his age. The plaintiff was 65 years of age at the time he was discharged. He claims that the defendant discharged him because of his age. The defendant denies this and claims that the plaintiff's position as Facilities Manager at the Hamilton, Mississippi, facility was eliminated as part of a nationwide (p. 8) reduction in force.

To establish age discrimination, the plaintiff must prove by a preponderance of the evidence that the defendant would have kept him in his job but for his age. He need not show that age was the only factor defendant acted on but he must prove that age was a determining factor that caused the company to discharge him. There is no issue here of whether or not the company's decision was a fair one or a wise one; the only question you are to consider is whether plaintiff's age motivated the defendant to discharge him.

When the plaintiff has offered evidence from which you could conclude that the defendant discharged him because of his age, the defendant may show that it had a reason other than age for its actions.

If the defendant has shown a reason or reasons for pllaintiff's discharge other than age, the plaintiff may then show that these were not the true reasons. If you find by a preponderance of the evidence that the reason or reasons stated by the defendant for discharging the plaintiff were a pretext or cover-up for what in truth was a discriminatory purpose, then it is your sworn duty to return a verdict for the plaintiff, George Adam. I re-

mind you that the burden of proof in this case remains with the plaintiff throughout the case.

How do you define pretextual for the purpose of (p. 9) determining whether the reason or reasons given by Kerr-McGee Chemical Corporation for terminating the employment of George Adam were unacceptable as a defense to the charge of age discrimination? Pretextual is whether the decision to fire him was unlawfully motivated. It does not turn on whether you approve of those reasons but whether they were unlawfully motivated and simply an effort to evade the law against age discrimination.

The Court instructs the jury that if, under the Court's instructions, you should find by a preponderance of the evidence that the plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include:

(1) the total amount of wages from the time that he was fired to this date; also, you should award other lost fringe benefits, including the employer's contribution to a company matched savings plan and an employee stock option plan; you should substract from that sum wages actually earned from other employment; and

(2) retirement payments, pension benefits, and the value of stock certificates received from the Kerr-McGee Chemical Corporation by the plaintiff.

The Court instructs the jury that the Age Discrimination in Employment Act provides that the plaintiff is entitled to liquidated damages if the conduct of the defendant, Kerr-McGee Chemical Corporation, in violating the Act was willful. (p. 10) You will have to determine

by a preponderance of the evidence whether the defendant's violation of the Act was willful. That is, did the defendant willfully use age as a determining factor in the decision to terminate plaintiff?

What do we mean by willfully?

A violation of a law is willful if the defendant knew or demonstrated reckless disregard for the matter of whether its conduct was prohibited by the Age Discrimination in Employment Act. If you find by a preponderance of the evidence that Kerr-McGee Chemical Corporation terminated the employment of George Adam because of his age, and you further find by a preponderance of the evidence that Kerr-McGee Chemical Corporation knew or demonstrated a reckless disregard for the matter of whether its conduct in terminating the employment of George Adam was prohibited by the Age Discrimination Employment Act, then you should find that the acts of Kerr-McGee Chemical Corporation were willful.

The plaintiff bases his lawsuit on the Age Discrimination in Employment Act, as amended. The Act, in pertinent part, provides that it shall be unlawful for an employer to discriminate against an employee because of his age. The law applies to individuals who are between the ages of 40 and 70.

However, the replacement of an older worker with a younger one is not necessarily unlawful and does not automatically raise any inference of improper motive. The law also (p. 11) provides that it shall not be unlawful for an employer to take any action, other prohibited, where such action is based on reasonable factors other

than age. Thus, if the elimination of the position of Facilities Manager was based on reasonable factors other than age, there is no violation of the law. In that case, the plaintiff is not entitled to recover.

The plaintiff in this case has the burden of proving by a preponderance of the evidence that the defendant eliminated the position of the Facilities Manager because of the plaintiff's age. Therefore, in order for plaintiff to prevail in his age discrimination claim regarding the elimination of the Facilities Manager position, he must prove each of the following elements by a preponderance of the evidence:

First: that he was qualified to do the job;

Second: that the plaintiff's age was a motivating and determinative reason for the elimination of the Facilities Manager position; and

Third: that the defendant's asserted reasons for eliminating the Facilities Manager position was a cover-up for age discrimination.

The Court instructs you as a matter of law that the defendant has stated a legitimate, nondiscriminatory reason for eliminating the position of Facilities Manager. If you believe the defendant's stated reasons, then you must find for the defendant. In order to find that the plaintiff was (p. 12) terminated because of his age, plaintiff must have proven that the defendant's decision to eliminate the Facilities Manager position was unlawfully motivated by a determining factor of age. If the defendant was motivated to eliminate the Facilities Manager position by reasons other than the plaintiff's age, then you must find for the defendant.

The plaintiff bears the burden of proving that the defendant's reasons for eliminating the position of Facilities Manager were not their true reasons, but a cover-up to conceal age discrimination.

You are instructed that the plaintiff's own belief of age discrimination, however genuine, cannot be the basis for a finding of age discrimination. If the plaintiff has not produced evidence beyond his own belief that the defendant was motivated by age discrimination, and the plaintiff's own belief that his job performance was adequate, the plaintiff's evidence of pretext would be inadequate and you must find for the defendant.

You are further instructed that you are not to sit in judgment as to whether the defendant's decision to remove the plaintiff was an accurate or wise decision. Even if the reasons offered by the defendant appear to be bad reasons, frivolous reasons, or reasons of which you may not personally approve, you cannot find in favor of the plaintiff unless you are persuaded that the plaintiff has proved that the reasons (p. 13) offered by the defendant were a pretext or cover-up designed to conceal age discrimination. The only conduct made unlawful by the Age Discrimination in Employment Act is discrimination based on age.

If you find by a preponderance of the evidence that defendant unlawfully eliminated the position of Facilities Manager because of the plaintiff's age in violation of the Age Discrimination in Employment Act, as amended, then you must determine what damages should be assessed against the defendant. Pursuant to the Act, you may award the plaintiff back pay and fringe benefits from

November 1, 1982, through the date of this trial. You are further instructed that you are to deduct from the back pay award those amounts of money that the plaintiff actually earned between October 31, 1982, and the present.

In addition, you are to deduct from the back pay award any sums that exceed actual earnings that the plaintiff would have earned had he remained with the defendant as a consultant. In determining this amount you are to consider the amounts, if any, which you believe from a preponderance of the evidence in this case that the plaintiff would have reasonably earned under the consulting agreement he had with the defendant as well as the probability, if any, that he would have been retained as a consultant under a similar agreement in a subsequent period.

(p. 14) The Court instructs you that you are to deduct from the back pay award any retirement and pension benefits and severance pay received by the plaintiff that he would not have received had he not left the defendant's company.

The Court instructs you that in certain, limited cases you may consider an award of liquidated damages against the defendant if you find that the defendant discriminated against the plaintiff as a result of his age.

In order to consider awarding liquidated damages, the plaintiff must prove that the employer knew or showed reckless disregard for whether its conduct was prohibited by the Age Discrimination in Employment Act. The Court instructs you that the mere knowledge of the Age Discrimination in Employment Act is not sufficient for an award of liquidated damages.

Liquidated damages are intended to punish a defendant who knowingly or recklessly violates the law and may be awarded only when the employer, in this instance, Kerr-McGee Chemical Corporation, knew its conduct was prohibited by the Age Discrimination in Employment Act or showed a reckless disregard for whether its conduct was so prohibited. The defendant's action of abolishing the Facilities Manager position is not, in and of itself, sufficient for an award of liquidated damages.

If you find that an award of liquidated damages is appropriate as defined by these instructions, you may award (p. 15) the plaintiff an amount of money governed by your common sense and judgment not to exceed the amount of the back pay award you calculated pursuant to the Court's earlier instructions.

The Court instructs the jury that even if you find that age was merely one of several factors that led to the elimination of the Facilities Manager position, that does not mean that the defendant's decision was unlawful. If the evidence shows that the Facilities Manager position would have been eliminated regardless of the plaintiff's age, then you must find for the defendant. In other words, the plaintiff must prove that age was a motivating or determinative factor in the elimination of the Facilities Manager position.

Of course, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in any way as an indication that I believe the plaintiff should, or should not, prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary

that each juror agree. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with (p. 16) your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in open court. A form of the verdict in this case, special interrogatories, have been prepared for you to answer and will be furnished to you. The interrogatories are questions with a place on the form for you to check your answer.

The first interrogatory reads:

1. Do you find by a preponderance of the evidence that plaintiff's employment was terminated by Kerr-McGee Corporation in violation of the Age Discrimination in Employment Act?

If you so find, if you find for the plaintiff, you check yes. If you find that it was not in violation of the Act, you check no, which in essence would be a verdict for the (p. 17) defendant.

If you answer no to question number one, you go no further. You simply report to the Marshal, who will be in attendance with you, that you are ready to report your verdict.

If your answer to number one is yes, then you must answer questions two and three.

Question number two is: What sum, if any, do you award the plaintiff George E. Adam for loss of wages to date and fringe benefits?

And then number three is: Do you find by a preponderance of the evidence that Kerr-McGee Chemical Corporation knew or showed a reckless disregard for whether its conduct was prohibited by the Age Discrimination in Employment Act?

And, of course, that addresses the issue, as stated by the earlier instruction, as to whether or not the conduct was willful. If you answered that in the affirmative, then you move on to question four. If you answer it no, then you do not answer question four. But those instructions are contained on the form.

Question number four is: What sum do you award the plaintiff George E. Adam as liquidated damages? This amount is in addition to but may not exceed the award of back pay and fringe benefits.

When the special interrogatory form has been completed, it must be dated and signed by the foreman, the person (p. 18) you elect as foreman of the jury.

You will take this form to the jury room. When you have reached a unanimous agreement as to your verdict, you will have the foreman fill it in, date it, sign it, return it to the courtroom. If during your deliberations you shall desire to communicate with the Court, please reduce your message or question to writing, signed by the foreman or forewoman, and pass the note to the Deputy United States Marshal, who will be in attendance with you, who will bring the matter to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally.

I caution you, however, that with regard to any message or question that you may send that you should never state or specify your numerical division at the time. Never tell me how you are divided or how you stand.

Ladies and gentlemen of the jury, that concludes the Court's charge to the jury.

END OF TRANSCRIPT

(p. 19) CERTIFICATE

I, Richard M. Bumpus, Official Court Reporter in and for the United States District Court, Northern District of Mississippi, hereby certify that the foregoing 18 pages contain a true transcript of my Stenotype notes taken at the time and place hereinbefore set forth.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Witness my signature, this 31 day of December, 1986.

/s/ Richard M. Bumpus

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GEORGE E. ADAM

v.

KERR-McGEE CHEMICAL CORPORATION

JUDGMENT IN A CIVIL CASE

CASE NUMBER: EC 84-49-D-D

[X] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, GEORGE E. ADAM, take nothing from his action against the defendant, KERR-McGEE CHEMICAL CORPORATION, and the complaint filed against him be, and the same hereby is, DISMISSED with prejudice, and all costs are taxed to the plaintiff.

November 26, 1986
Date

NORMAN L. GILLESPIE
Clerk

Entered 11/26/86
Civil Order Book 43
Page 220

/s/ Rosalee K. Ellixson
(By) Deputy Clerk
Rosalee K. Ellixson

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4089

GEORGE E. ADAM,

Plaintiff-Appellant,
Cross-Appellee,

v.

KERR-McGEE CHEMICAL CORPORATION,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Mississippi

(EC-84-49-GD-D)

(February 9, 1988)

Before GARZA, REAVLEY and DAVIS, Circuit Judges.

PER CURIAM*

The plaintiff sought relief in the district court, claiming that his employer discharged him in violation of the Age Discrimination in Employment Act. The court held

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

that the plaintiff was excused for his failure to timely file a charge with the Equal Employment Opportunity Commission, but the jury found that the employer had not engaged in an employment discrimination practice. On review, we are asked to study these two matters, the court's evidentiary rulings, and the plaintiff's post-trial motions.

I. Facts and Proceedings

George E. Adam ("Adam") was the Facilities Manager at Kerr-McGee Chemical Corporation ("Kerr-McGee") in Hamilton, Mississippi. Adam had been employed by Kerr-McGee or its predecessor since 1948. A chemical engineer, Adam was in charge of the company's electrolytic and pigment plants. Both plants were operated at record production levels and Adam maintained excellent control of manageable costs.

Due to a dismal financial quarter in fiscal year 1982, Kerr-McGee decided to reduce employment in the company. The company implemented a plan known as the Effective Manning Program ("EMP"). Guidelines were implemented to reduce company personnel. Those guidelines included the elimination of unnecessary positions, regardless of who held the position or whether the position was in a profitable or nonprofitable area of the company.

According to Kerr-McGee, the Facilities Manager position at Hamilton was an obvious choice for elimination. The plaintiff was informed of his discharge on September 27, 1982. He was not actually discharged until October 31, 1982. The two plant managers who previously reported to the plaintiff were given complete responsibility for

their respective operations. Adam was 65 years old when he was discharged. Both plant managers were about 40 years of age.

Adam felt that he was forced out because of his old age. He found out that among the criteria used in the EMP, age was a consideration. Further, prior to the termination, Adam learned that Kerr-McGee's vice-president of the pigment division, William Hayes, contacted an equal opportunity officer to ask whether termination of Adam would give rise to an age discrimination suit.

Consequently, Adam called the Equal Employment Opportunity Commission ("EEOC") to find out whether there was a potential age discrimination claim. He was informed that he must file a complaint within 180 days. He asked when the 180-day period began to run. He was told that it began to run on his termination date, rather than the date of notice. In reliance on this incorrect information from the EEOC, Adam filed an untimely charge with the EEOC on April 27, 1983.

On February 9, 1984, after the parties had failed to negotiate an extended consulting contract, Adam filed a complaint against Kerr-McGee, alleging violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The defendant raised the affirmative defense that plaintiff failed to file his charge of discrimination with the EEOC within the time period prescribed in the ADEA. On June 10, 1985, Judge Neal Biggers denied the defendant's motion for summary judgment regarding plaintiff's failure to timely file his charge of discrimination with the EEOC.

On November 12, 1986, the court entered an order bifurcating the statute of limitations and liability phases of the trial. On November 24, Judge Glen Davidson conducted a bench trial on the question of the tolling of the filing requirement. He concluded that the plaintiff had proved by a preponderance of the evidence that his claim was subject to equitable tolling because of his good faith reliance on the EEOC's misinformation.

Trial on the issue of liability began on November 24, 1986. Subsequent to the three day trial, it took the jury just 42 minutes to determine that the defendant had not engaged in age discrimination. The plaintiff's motions for judgment notwithstanding the verdict and new trial were denied by order entered January 20, 1987.

II. Discussion

Adam proposes two challenges on appeal. First, he argues that the district court erroneously instructed the jury. Second, he claims that the district court erred in denying his judgment notwithstanding the verdict and new trial motions. On cross-appeal, Kerr-McGee asks whether the district court erred in determining that Adam was excused for his failure to file a timely EEOC charge. Since resolution of this issue may control our attention to the other issues, we will address first Kerr-McKee's contentions on cross-appeal.

A. *The Limitations Question.*

Adam was informed of the discharge on September 27, 1982. His job actually was terminated on October 31, 1982. Shortly thereafter he contacted the EEOC. The

EEOC allegedly misinformed him that a charge must be filed within 180 days of job termination, rather than notice of termination. Following the EEOC's advice, Adam filed an EEOC charge on April 26, 1983. April 26th was within 180 days of the date of job termination, but was more than 180 days from the date of notice of discharge.

The ADEA provides for a 180-day period following an alleged discriminatory employment practice during which a charge of discrimination must be filed. 29 U.S.C. § 626(d)(1). Although this is not a jurisdictional requirement, it is a requirement that an employee file a charge of discrimination with the EEOC during this 180-day period in order to pursue a claim in federal court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132 (1982). Thus, the limitations period is subject to waiver, estoppel, and equitable tolling. *Id.* Adam admits that he was notified of his discharge on September 27, 1982, and that he did not timely file his charge with the EEOC.

The district court ruled that the limitations period should be tolled because of Adam's reliance on the EEOC administrator. Although there is some room to believe that Adam should have and could have made an additional effort to determine when the limitations period began to run, it is clear that the lower court did not err in tolling the 180-day statutory limitation period for equitable reasons. *See Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295, 1302-03 (5th Cir. 1979). Seemingly authoritative statements by an agency presumed to know the most about a matter is sufficient to toll the running of the filing period with the EEOC. *Page v. U.S. Indus., Inc.*, 556 F.2d 346,

351 (5th Cir. 1977), *cert. denied,* 434 U.S. 1045, 98 S.Ct. 890 (1978).

The determination of the tolling issue rested solely on Adam's credibility. Since Adam's testimony was not contradicted, it was believed by the trial court. The district court entered a finding of fact which this court is reluctant to set aside.

B. *Jury Instructions.*

Jury Instruction No. 9 reads:

> The Court instructs the jury that even if you find that age was merely one of several factors that led to the elimination of the Facilities Manager position, that does not mean that the defendant's decision was unlawful. If the evidence shows that the Facilities Manager position would have been eliminated regardless of the plaintiff's age, then you must find for the defendant. In other words, the plaintiff must prove that age was a motivating or determinative factor in the elimination of the Facilities Manager position.

Adam states that this is the classic mixed motive case. He claims that he did present direct evidence of age discrimination. Adam complains that the trial judge gave no guidance to the jury with regard to the burden of proof that fell upon the defendant to demonstrate that Adam would have been discharged irrespective of his age.

A plain reading of the charge, and Jury Instruction No. 9 in particular, contains no instruction with regard to a shifting burden of proof. Our study of the record shows that although the plaintiff objected to Jury Instruction No. 9, he did not object to the lack of an allocation of the burden of proof argument which he presents on appeal.

Adam merely objected to the instruction because of the difference between the word "the" instead of the word "a" as a motivating or determinative factor in the elimination of the position. Thus, Adam's objection rested solely on the "the" versus the "a" wording. A modification of that language was made in Adam's favor at a chamber conference.

Following the court's charge to the jury, the court asked counsel whether the plaintiff had any objections regarding the instructions. Counsel remained silent. Counsel did not raise any objection to the lack of a *Mt. Healthy*-shifting burden of proof instruction. Therefore, under Rule 51 of the Federal Rules of Civil Procedure, there was no timely objection, and Adam cannot complain about this point on appeal. *See Farrar v. Cain*, 756 F.2d 1148, 1150 (5th Cir. 1985). Adam did not properly object prior to the jury's deliberation in order to give the court the opportunity to correct an alleged error. Counsel even conceded at oral argument that he did not complain about the trial court's instruction regarding the shifting burdens.

Even if the plaintiff had objected properly to the court's charge, we would be bound to hold that it is inappropriate to instruct a jury under these circumstances on shifting burdens of proof at the conclusion of a full proof trial.

> In a full proof case, the ultimate issue of fact is always whether the plaintiff was intentionally discriminated against contrary to ADEA. The burden of persuading the trier of fact on this issue remains at all times with the plaintiff. When the court has allowed both parties to develop their full proof, the analysis of the

> evidence should look to whether plaintiff has met the ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination.

Smith v. Farah Mfg. Co., 650 F.2d 64, 68 (5th Cir. 1981); *see Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1095 (1981). In *Burdine*, the Supreme Court held that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253, 101 S.Ct. at 1093.

Adam submits that the legal standard enunciated in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), should be applied to this ADEA case. *Mt. Healthy* provides that once the Title VII plaintiff shows the presence of a discriminatory motive for the discharge, the defendant can rebut it only by proving by a preponderance of the evidence that the same decision would have been reached even absent that factor. *Id.* at 287, 97 S.Ct. at 576. Adam's contention that this court adopt a *Mt. Healthy* formula for allocating the burden of proof in mixed motive ADEA cases runs contrary to the law of this circuit. *See Smith*, 650 F.2d at 68.

C. *The J.N.O.V. and New Trial Motions.*

Following the jury's verdict, the plaintiff filed a motion for judgment notwithstanding the verdict and, alternatively, a motion for new trial on the ground that the jury's verdict was against the weight of the evidence. He also complained that the court erred in certain evidentiary matters. Adam states that Kerr-McGee never offered any evidence to rebut the direct evidence that age discrimina-

tion motivated the company's decision to fire him. Plaintiff's Exhibit No. 7, a confidential memorandum entitled "Proposed Management Changes Hamilton, Mississippi," illustrated the plan of action to force Adam out of the company. That exhibit states that Adam had done a good job in developing several "young managers," and if those young managers were not given positions of greater responsibility, they would seek them in other companies. The memorandum pointed out that Adam was of "the age of potential retirement." Additionally, the vice-president of the plant testified that the EMP set up a climate in which the company would be more inclined to sever an older, rather than a younger employee.

Kerr-McGee argues that age was not a discriminatory criterion in the EMP. Age was only a factor for determining the amount of benefits received for those whose jobs were terminated. Employees who were 55 years old and older were eligible for higher severance pay as well as increased pension. Further, Hayes apparently contradicted himself as he also testified that age was not a factor in the release of Adam. Certainly a jury could have inferred from Hayes' testimony that age had no relationship to the decision or it could have rejected Hayes' testimony altogether due to its inconsistency. "[I]f the record evidence supports more than one reasonable view, the jury's choice among these must be respected." *Neely v. Delta Brick & Tile Co.*, 817 F.2d 1224, 1225 (5th Cir. 1987). Certainly the jury, as the finder of fact, could have inferred from all the evidence that Adam's age had no relation to his dismissal.

Adam also complains that the lower court made two evidentiary rulings which resulted in prejudice to him.

Mr. Hayes was asked this question: "If George Adam had been 39 years old with his talents, would Kerr-McGee Chemical Corporation have taken this action?" Defense counsel objected and the court sustained the objection on the grounds of relevancy. In his deposition, Hayes testified that it would have been very unlikely that Adam would have been terminated under those circumstances. The second alleged prejudicial error involved the testimony of Hayes when he was being examined by Kerr-McGee's counsel. Adam claims error in the fact that Hayes was questioned on whether Adam's age was "the" motivating factor as opposed to "a" motivating factor in his release. The confusion arising from these differences, it is argued, misled the jury as to the proper legal standard to be ultimately applied.

Adam's complaints about the court's evidentiary rulings do not constitute reversible error. If there was error, it was nothing more than harmless error for the court to deny the question towards Hayes. Relevancy is a matter in which the trial court enjoys wide discretion. Regarding Adam's complaint that the court permitted testimony about whether age was "the" motivating rather than "a" motivating factor, we are unaware of any decision holding that counsel on cross-examination must phrase his questions to track precisely with the wording of the jury instruction. Trial judges are entitled to great deference with regard to their evidentiary rulings. *Goff v. Continental Oil Co.*, 678 F.2d 593, 596 (5th Cir. 1982).

III. Conclusion

After 34 years of faithful service, Mr. Adam is rewarded by Kerr-McGee with job termination. Since Kerr-

McGee did not participate in a discriminatory employment practice, however, we cannot grant relief to Mr. Adam for this treatment. Finding no merit in the claims on appeal, the judgment of the district court is AFFIRMED.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4089

D.C. Docket No. EC-84-49-GD-D

GEORGE E. ADAM,

Plaintiff-Appellant
Cross-Appellee,

versus

KERR-MCGEE CHEMICAL CORPORATION,

Defendant-Appellee
Cross-Appellant.

(Filed February 9, 1988)

Appeals from the United States District Court for the Northern District of Mississippi

Before GARZA, REAVLEY, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

February 9, 1988

ISSUED AS MANDATE: MAR 2 1988

A true copy

Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Carol G. LeSage
Deputy
New Orleans, Louisiana MAR 2 1988

Supreme Court, U.S.
FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1652

In The

Supreme Court of the United States

October Term, 1987

GEORGE E. ADAM,

vs. *Petitioner,*

KERR-McGEE CHEMICAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

1. Is the Court precluded from reviewing an allegedly erroneous jury instruction where the Petitioner failed to object to the instruction at trial as required by Rule 51 of the Federal Rules of Civil Procedure?

2. Is a jury instruction in an age discrimination case erroneous because, in the *liability* phase of the trial, it does not place the burden of proof on the defendant to prove that it would have discharged plaintiff regardless of plaintiff's age?

LIST OF PARTIES

Pursuant to Supreme Court Rule 28.1, respondent herewith submits the following list of its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation:

1. Kerr-McGee Corporation;
2. White Shoal Pipeline Corporation;
3. Brewster Phosphates;
4. Ace Limited (Offshore);
5. Basic Management, Inc.;
6. Bikita Minerals (Foreign);
7. Corporate Officers & Directors Assurance Holding (Foreign);
8. Downtown Airpark, Inc.;
9. Oil Casualty Insurance Ltd. (Foreign); and
10. Oil Insurance Limited (Foreign).

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No. 87-1652

In The

Supreme Court of the United States

October Term, 1987

GEORGE E. ADAM,

Petitioner,

vs.

KERR-McGEE CHEMICAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Kerr-McGee Chemical Corporation, respectfully requests that this Court deny George E. Adam's Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 9, 1988.

JURISDICTION

The jurisdictional statement in the Petition is correct. Respondent does not question the jurisdiction of this Court.

STATEMENT OF THE CASE

George E. Adam ("Adam") was the Facilities Manager at Kerr-McGee Chemical Corporation's ("Kerr-McGee") Hamilton, Mississippi facility. (Petition, App. 3 at p. 19a). Kerr-McGee's bleak financial outlook in 1982 caused it to undertake a reduction in its workforce. (*Id.*). The reduction in force was implemented pursuant to a plan known as the Effective Manning Program, which required the elimination of unnecessary positions, regardless of who held the position or whether the position was in a profitable or non-profitable area of the company. (*Id.*). Because of recently completed corporate restructuring, Adam's job as Facilities Manager was an obvious choice for elimination. (*Id.*).

Adam was informed about the decision to eliminate the Facilities Manager position on September 27, 1982. (*Id.*). Adam's job responsibilities as Facilities Manager were divided among two other managers who had previously reported to him. (*Id.* at 19a-20a). These managers were approximately forty years of age. (*Id.* at 20a). Kerr-McGee did not dispute the fact that Adam had been an excellent employee. In fact, following the elimination of his job, Kerr-McGee negotiated a lucrative consulting agreement with Adam under which he performed for several months. Adam initiated this action only after he

could not negotiate a long-term consulting agreement with Kerr-McGee. (*Id.*).

On November 24, 1986, Adam's case was presented to a jury. Following a three day trial, it took the jury 42 minutes to determine that Kerr-McGee had not intentionally discriminated against Adam because of his age. (*Id.* at 21a). Adam appealed this adverse finding to the United States Court of Appeals for the Fifth Circuit, which upheld the verdict by judgment entered February 9, 1988.

REASONS FOR DENYING THE PETITION

Petitioner urges this Court to review an allegedly erroneous jury instruction given by the district court at the trial of this case. The jury instruction about which Petitioner complains reads as follows:

> The Court instructs the jury that even if you find that age was merely one of several factors that led to the elimination of the Facilities Manager position, that does not mean that the defendant's decision was unlawful. If the evidence shows that the Facilities Manager position would have been eliminated regardless of plaintiff's age, then you must find for the defendant. In other words, the plaintiff must prove that age was a motivating or determinative factor in the elimination of the Facilities Manager Position.

(Petition at p. 5). Petitioner contends this instruction is erroneous because the case was a "mixed" or "dual" motive case and, consequently, the instruction did not properly shift the burden of proof to the defendant to

prove that plaintiff's position would have been eliminated regardless of his age.

The Court should not grant the Petition for a Writ of Certiorari for the following reasons: (1) Petitioner did not object to the allocation of the burden of proof as required by Rule 51 of the Federal Rules of Civil Procedure and did not give the district court or the Respondent notice of a defect in the instruction or the opportunity to correct it; and (2) the instant action is an inappropriate case for the Court to address the issue raised by the Petitioner.

1. Petitioner Failed to Comply with Rule 51.

Petitioner seeks the Court's review of an allegedly erroneous jury instruction. (Petition, p.i). Petitioner advanced the same argument before the Court of Appeals. (Petition, App. 3, p. 23a). Respondent urged the Court of Appeals to reject Petitioner's complaint about the jury instruction, in part, because Petitioner did not object to the instruction before the district court as required by Rule 51 of the Federal Rules of Civil Procedure. (*Id.*). The Court of Appeals specifically held that "under Rule 51 of the Federal Rules of Civil Procedure, there was no timely objection, and Adam cannot complain about this point on appeal." (*Id.* at 24a).

Rule 51 states that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. This is a simple and just rule for both the litigants and the court. Timely objections provide notice to the trial court and opposing counsel of a potential error and give them the

opportunity to make corrections. Thus, the necessity of a retrial may be avoided. *See* Wright and Miller, 9 *Federal Practice and Procedure* § 2551 (West 1971). Indeed, the Court of Appeals in the instant case found that "Adam did not properly object prior to the jury's deliberation in order to give the court the opportunity to correct an alleged error." (Petition, App. 3, p. 24a).[1] In a recent opinion, this Court refused to decide a case on the grounds that the Petitioner had not met Rule 51 requirements during the trial. *See City of Springfield v. Kibbe*, ___ U.S. ___, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987). This Court has also held that non-jurisdictional defects, including the failure to comply with Rule 51 requirements, could preclude the Court's granting a petition for a writ of certiorari where the Rule 51 defect was argued before the appellate court and timely raised in the Respondent's brief in opposition to the petition for a writ of certiorari. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Respondent has met the *Tuttle* criteria.

Petitions for a writ of certiorari have been granted in limited instances even though Rule 51 requirements were not technically met. *See City of St. Louis v. Praprotnik*, ___ U.S. ___, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *City of Oklahoma City v. Tuttle, supra*, 471 U.S. at 815-16; *City of*

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[1] Petitioner gives little attention to the Court of Appeals' holding with respect to Rule 51. Petitioner obliquely states that an objection was made, albeit unspecific, as if his failure to object properly was a mere technicality. (Petition, p. 3 n.1). The Court of Appeals found, however, that Adam's objection regarding the jury instruction at issue made *no reference whatsoever* to the burden of proof, but went to other matters, which was in fact sustained. (Petition, App. 3, p. 23a-24a).

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). In each of those cases, however, the Rule 51 defect was not timely raised in the Respondent's opposition to the petition for writ of certiorari. In addition, each of those cases dealt with theories of substantive liability rather than with evidentiary burdens of proof. *See City of St. Louis v. Praprotnik, supra,* 108 S.Ct. 915, 99 L.Ed.2d 107 ("This case calls upon us to define the proper legal standard for determining when isolated decisions by municipal officials or employees may expose the municipality itself to liability under 42 U.S.C. § 1983."); *Oklahoma City v. Tuttle, supra,* 471 U.S. at 810 (examining an issue very similar to the issue in *Praprotnik*); *City of Newport v. Facts Concerts, Inc., supra,* 453 U.S. at 249 ("The question presented by this case is whether a municipality may be held liable for punitive damages under § 1983.")

In contrast, the issue presented in the instant case is not whether the defendant could be held liable under an evolving theory of substantive law but, rather, whether the burden of proof within the context of a specific jury instruction was correct. It is important to note that Petitioner has never questioned the validity of the "mixed" or "dual" motive theory in an age discrimination case at any stage of these proceedings. Petitioner's exclusive basis of objection before this Court and the Court of Appeals has been confined to the burden of proof portion of a jury instruction, to which he made no objection at trial.

In sum, granting certiorari in the instant case, where the exclusive basis of review is the allocation of proof as expressed in a jury instruction and where no objection

was made regarding the jury instruction, would effectively emasculate Rule 51. Furthermore, it invites neglect, abuse and waste of judicial resources which Rule 51 was specifically designed to prevent.

2. The Instant Case is An Inappropriate Case for the Court to Review the Issue Presented in the Petition.

The issue presented by Petitioner is whether the burden of proof shifts to the employer in a "mixed" or "dual" motive age discrimination case to prove that the employee would have been discharged regardless of his age. There is no question that the courts of appeals have reached conflicting conclusions on the issue. For the reasons that follow, the instant case presents a particularly inappropriate vehicle for this Court's review of that issue.

The "mixed" or "dual" motive concept was first introduced in employment litigation in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *Mt. Healthy* discussed the "dual motive" concept in the context of a First Amendment case. This Court has never specifically addressed the "mixed" or "dual" motive issue in the context of a case brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) or the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*).

The *Mt. Healthy* analysis involves two separate steps. First, the employee must prove that an unlawful consideration was "a motivating factor" in the employer's discharge decision. *See* 429 U.S. at 287. If, and only if, the employee successfully makes this showing, the burden

then shifts to the employer to show that it would have reached the same decision even in the absence of the unlawful consideration. *Id.*

As the Petitioner correctly observes, the courts of appeals have reached differing conclusions on *Mt. Healthy's* application to ADEA and Title VII cases. (Petition at p. 6-7). The analysis of this issue by the courts of appeals has proceeded along very different lines. Some courts of appeals have held that the *Mt. Healthy* analysis is equivalent to an affirmative defense that the defendant is required to prove in order to escape *liability. See e.g., Spanier v. Morrison's Management Svcs.*, 822 F.2d 975, 979-80 (11th Cir. 1985) (ADEA case); *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 711-13 (6th Cir. 1985) (Title VII case).

Other courts of appeals, however, have held that the *Mt. Healthy* analysis only applies to the *remedial* phase of the case and does not serve to negate a defendant's liability. In other words, the *Mt. Healthy* analysis comes into play *only after* liability is established and the fact finder is considering the appropriate remedy to impose. *See e.g., Bibbs v. Block*, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (Title VII case); *Caviale v. State of Wisconsin*, 744 F.2d 1289, 1296 (7th Cir. 1984) (Title VII case); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 617-19 (4th Cir.) (ADEA case), *cert. denied*, 469 U.S. 832 (1984).

On the other hand, the courts of appeals are compelled to follow this Court's ruling in *United States Postal Bd. of Gov. v. Aikens*, 460 U.S. 711 (1983), that once a "full proof" trial is completed, it is up to the fact finder to decide the "ultimate issue" of whether the employer

intentionally discriminated against the employee. *Id.* at 715. The burden of persuasion remains at all times with the employee. *Id.* at 716. As *Aikens* teaches, it is unnecessary to make the ultimate factual inquiry more difficult by imposing a complicated scheme that shifts the allocation of proof from one party to the other. *Id.* Since the instant case was fully tried on the merits, there was no reason to impose the burden shifting formula asserted by Petitioner.

The question the Court now faces is whether the instant case is the appropriate vehicle to resolve these varying views. In order to answer this question, the disputed jury instruction must be examined within the context of the facts and circumstances existing during the trial. The evidence presented at trial was typical of most employment discrimination actions in that, depending upon which version of facts the fact finder credited, evidence existed that lawful or unlawful factors or both led to Petitioner's discharge. Although it was Respondent's position that Petitioner's age played no role whatsoever in his discharge, Respondent requested the district court to give the jury instruction about which the Petitioner now complains in recognition of the Petitioner's evidence.

The jury instruction at issue goes *only* to the question of *liability* and simply attempts to define the term "motivating factor" as being a factor without which the decision would not have been made. If there is any issue presented by the instruction at all, it is whether its definition of the term "motivating factor" is correct.

In other words, the instruction about which the Petitioner complains is not a *Mt. Healthy* instruction in the classic sense. It did not instruct the jury that if it found that age was a motivating factor in the discharge decision, the burden then shifted to the employer to show that the employee would have been discharged anyway. It merely instructed the jury that if it found that age was one among several factors in the discharge decision, it needed to determine whether the age factor was a "motivating" factor in the decision. The jury was then instructed that a "motivating" factor was one without which the decision would not have been made.

Had the Petitioner objected to the instruction's definition of a "motivating" factor or proposed a classic *Mt. Healthy* instruction, this case would be much different. The fact is, however, that the district court properly placed the burden of proof on the Petitioner in the *liability* phase of the trial and no objections were made to that decision. The Petitioner did not propose a *Mt. Healthy* instruction in either the *liability* or *remedial* stages of the case and thus this Court is not presented with an appropriate setting in which to resolve the burden of proof issue.

The Court of Appeals' decision was manifestly correct. The instant case involved a "full proof" trial wherein, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (Petition, App. 3 at p. 25a, *quoting Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also United States Postal Bd. of Gov. v. Aikens*, 460 U.S. 711 (1983)). Since neither party requested a *Mt. Healthy*

instruction for use in the *remedy* phase of the trial, the Court of Appeals was not confronted with the need to rule on *Mt. Healthy's* application to the remedial stages of the litigation. Furthermore, since *Mt. Healthy's* burden shifting component is not designed for application in the *liability* portion of the trial, the Court of Appeals was correct in ruling that the burden of proof remained with the Petitioner to establish liability. *See Mt. Healthy, supra,* 429 U.S. at 284 ("We are not, however entirely in agreement with [the district court's] manner of reasoning from this finding [that protected speech was a factor in the discharge decision] to the conclusion that [plaintiff] is entitled to reinstatement with backpay.") The Court of Appeals' decision in the instant case is in accord with the Fourth Circuit Court of Appeals' decision in *Smallwood v. United Air Lines, Inc.,* 728 F.2d 614 (4th Cir.), *cert. denied,* 469 U.S. 832 (1984), which involved the same issue (*See* Summary of Issues, *Smallwood v. United Air Lines, Inc.,* 53 U.S.L.W. 3101 (August 14, 1984)), and reached the same conclusion regarding *Mt. Healthy's* burden shifting component.

Moreover, the instant case does not present the Court the opportunity to address a major question presented but not answered by *Mt. Healthy. Mt. Healthy,* perhaps intentionally leaves unanswered the question of precisely what kind of burden shifts to the defendant once the plaintiff produces evidence that an unlawful consideration was a "motivating factor" in the discharge decision. In other words, *Mt. Healthy* provides no guidance as to whether the burden of "production" or the burden of "going forward" shifts to the defendant. This Court has expressly recognized the important distinction between

those phrases. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983). Since the Petitioner did not propose an instruction that indicated the extent of the burden that shifted to Respondent, the Court is left with only a hypothetical situation on which to base its ruling on this important issue.

Every employment discrimination case is theoretically a "mixed" or "dual" motive case, depending upon the version of the proof the fact finder credits. Imposing a *Mt. Healthy* analysis in which the burden of proof to establish liability is shifted to the defendant, flies in the face of over twenty years of employment discrimination litigation in which this Court has consistently placed the burden on the plaintiff to establish *liability* in Title VII and ADEA cases. It is now inappropriate to change the rules of the game and shift the burden of proof in virtually every employment discrimination case to the defendant to establish that he would have discharged the plaintiff in any event. Furthermore, this is not an appropriate case in which to review the *Mt. Healthy* analysis for use in the *remedial* stage of the case because there is, simply, nothing to review. No instruction was propounded for that aspect of the case by either party. In sum, this case is altogether an inappropriate vehicle for ruling on *Mt. Healthy's* application to age discrimination cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH E. MILAM
W. THOMAS SILER, JR.
CAROLYN GREGG HILL

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